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No. 88-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

INTERNATIONAL MILL SERVICE,

and

THOMAS VAN DEN HANDEL,

Petitioners,

vs.

JAMES AUBUSCHON,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Illinois

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents the question of whether an order by the highest court in Illinois, pursuant to which a collective bargaining unit employee may maintain a state law defamation action against his employer and an agent of his employer for their publication of a notice of discipline to the employee's union, as required by the applicable collective bargaining agreement (including work rules promulgated thereunder and the settlement of a grievance thereunder), conflicts with this Court's prior decisions regarding the test for preemption of state law claims under Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, and/or Sections 7 and 8 of the National Labor Relations Act, 29 U.S.C. §§157 and 158.

This case also presents the question of whether the continuing confusion among federal and state courts, concerning how properly to apply the preemption tests under Section 301 of the Labor Management Relations Act and Sections 7 and 8 of the National Labor Relations Act to state law defamation claims, as typified by the order at issue herein, is jeopardizing the federal scheme of a uniform body of federal labor law and, hence, warrants a decision by this Court on this important issue of federal labor law.

PARTIES

The parties named in the caption are the only parties to this action. Pursuant to Supreme Court Rule 28.1, International Mill Service identifies its parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates as follows:

NEOAX, INC.

IU International Corporation

Envirosafe Services, Inc.

Intermetal Mexicana S.A.

IMS Lycrete Egypt, Ltd.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners hereby request that this Court issue a writ of certiorari to review an order of the Supreme Court of Illinois entered December 8, 1988.

OPINIONS BELOW

The unpublished order of the Supreme Court of Illinois is reprinted as Part A of the Appendix.

The opinion of the Appellate Court of Illinois, Fifth District, which is reported at 167 Ill. App. 3d 965, 522 N.E.2d 898 (1988), is reprinted as Part B of the Appendix.

The unpublished order of the Circuit Court of Madison County is reprinted at Part C of the Appendix.

STATEMENT OF JURISDICTION

On December 8, 1988 the Supreme Court of Illinois entered an order reversing the decision of the Illinois Appellate Court, Fifth District in this matter, and remanding this case to the Circuit Court of Madison County, Illinois for further proceedings. The Illinois Supreme Court's order cited, without comment, its decision in *Krasinski v. United Parcel Service,* 124 Ill. 2d 483, 530 N.E.2d 468 (1988). On December 30, 1988, Petitioners filed with the Supreme Court of Illinois a Motion for Reconsideration or, in the Alternative, Petition for Rehearing. On January 11, 1989, the Supreme Court of Illinois denied said Motion and Petition, and issued its mandate to the Circuit Court of Madison County, Illinois. This order is reprinted as Part D of the Appendix. On January 21, 1989, Petitioners filed with the Supreme Court of Illinois a Motion to Recall the Mandate based on Petitioners' intent to file this petition for a writ of certiorari. The Supreme Court of Illinois granted the Motion to Recall on February 1, 1989. This order is reprinted as Part E of the Appendix.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257.

STATUTES INVOLVED

The statutes involved in this Petition are 29 U.S.C. §185, and 29 U.S.C. §§157 and 158. The full text of these statutes are set forth as Part F of the Appendix.

STATEMENT OF THE CASE

A. Introduction

At issue herein is an order by the highest court in Illinois that enables state law to regulate conduct mandated by a collective bargaining agreement. This case, therefore, involves a decision by the Illinois Supreme Court which conflicts with applicable decisions of this Court. In addition, this case exemplifies the confusion which continues to exist among federal and state courts regarding the treatment of state tort claims in the context of a collectively bargained relationship. Hence, this case also involves important questions of federal labor law which should be decided by this Court.

This case originated when James Aubuschon ("Aubuschon"), a unionized employee of the International Mill Service ("IMS"), filed a defamation claim in the Third Judicial Circuit, Madison County, Illinois against his employer, IMS, and IMS's job site supervisor Thomas Van Den Handel ("Van Den Handel"). At the time Aubuschon's alleged defamation claim arose, he was employed by IMS pursuant to a collective bargaining agreegment ("Contract") with Local 2762 of the United Steel Workers of America ("Union").

The Contract contained the following relevant provisions:

ARTICLE 5: SENIORITY

5.5: Continuous service is broken by:. . . (B) Discharge for proper cause.

ARTICLE 7: GRIEVANCES

7.1: The procedure under this section is available to the Union and the Company for the presentation and settlement of grievances arising under the terms of this Agreement. When a grievance is to be filed by the Company, they shall do so at the second step. Should any difference arise between the Company and the Union, or its members

employed by the Company, as to the interpretation or application of, or compliance with, the provisions of this Agreement regarding working conditions or other matters or should any dispute of any kind arise, there shall be no interruption or impeding of the work, work stoppages, strikes or lockouts on account of such differences, but an earnest effort shall be made by the Company and the Union to settle such differences orderly and promptly in accordance with the procedures hereinafter set forth in this section.

7.3: The decision of the arbitrator shall be final and binding upon the Company, the Union and all employees concerned herein and the expenses incident to the service of the arbitrator shall be shared equally by the Local Union and the Company.

ARTICLE 13: SUSPENSION AND DISCHARGE

13.1: If an employee shall be suspended or discharged from his employment after the date hereof, and shall claim not later than the close of the second day following his suspension of discharge (exclusive of Saturday or Sunday) that his suspension or discharge was unjust, such suspension or discharge shall constitute a case arising under the method of adjudicating differences herein provided. *In cases where an employee has been suspended or dischcrged, the foreman shall notify said employee's committeeman of the case not later than the following work day.* If it should be ultimately decided under the rules of this Agreement that the employee has been unjustly discharged or suspended, the Company shall reinstate such employee with payment for any working time lost. All such cases of suspension or discharge shall be taken up and disposed within five (5) work days from the date of the suspension or discharge except when the case goes to arbitration. (Emphasis added).

13.3: Any reprimand of record to be issued to any employee *must be issued in the presence of a union steward,* and state the following information:

1: Name and seniority of the employee

2: Time and place of the incident complained of

3: Name of the Union Steward present

4: Reply of the employee (Emphasis added).

ARTICLE 15: MANAGEMENT

15.1: The management of the works and the direction of the working forces including the right to hire, suspend or discharge for proper cause, or transfer, and the right to relieve employees from duty because of lack of work or for other legitimate reasons, is vested exclusively in the Company, provided, however, that these rights will not be exercised in any way inconsistent with, or in violation of any other provision of this Agreement.

15.2: All employees must abide by reasonable rules and regulations as may be established by the Company from time to time.

ARTICLE 17: MISCELLANEOUS

17.6: Tools — It is agreed that mechanics will provide personal tools in the performance of their jobs, as specified by the company, i.e., up to one inch and one-half opening (1½"), one-half inch drives, as well as other related tools in accordance with the established tool list.

The Company agrees to continue the practice of replacing mechanic's personal tools which are lost or missing at the job site unless there is an abuse of this replacement provision. Broken tools which are guaranteed by the manufacturer will be the responsibility of the mechanic for replace-

ment; however, broken tools which are not guaranteed by the manufacturer will be replaced by the company. Where the manufacturer provides for partial credit for broken tools the company will make up the balance towards the price of full replacement.

Pursuant to Article 15 of the Contract, IMS had promulgated and implemented a set of plant rules of conduct, the violation of which subjected an employee to discipline, up to discharge. These rules were in effect at all times relevant to this matter. The rules which are pertinent to this matter are as follows:

16. Misusing or removing from the premises without proper written authorization, company property, records or other materials is prohibited.

19. Abuse or destruction of company property, tools or equipment is prohibited.

24. Stealing is prohibited.

25. Unlawful or improper conduct off the plant premises or during non-working hours which affect the employee's relationship to his job, his fellow employees, his supervisor or the Company's product, property, reputation or goodwill in the community is prohibited.

27. An employee shall be responsible for all Company tools, equipment and property assigned to or requisitioned by him or in his custody or care.

When Aubuschon commenced working for IMS, he had a set of tools. In the summer of 1980, Aubuschon reported his tools stolen and IMS replaced the allegedly stolen tools. In approximately 1981, Aubuschon reported that the replacement tools had been stolen. IMS again replaced Aubuschon's allegedly stolen tools. In February, 1982, Aubuschon again reported that his tools were missing, and again asked IMS to replace his miss-

ing tools. When IMS denied Aubuschon's request, Aubuschon filed a grievance alleging that IMS's refusal to again replace his tools constituted a contract violation. In settlement of this grievance, IMS ultimately agreed to replace Aubuschon's missing tools. IMS advised Aubuschon, however, that he would have to accept and use the specific tools which IMS provided in settlement of his grievance. Aubuschon subsequently denied being advised that he would have to use the particular tools which IMS had supplied to him.

When Aubuschon was advised of IMS's decision, Aubuschon asked for invoices for the tools that IMS supplied so that he could establish (i) ownership of the tools, (ii) the value of the tools if he decided to insure them, and (iii) proof of purchase of the tools. IMS agreed to funish Aubuschon with the requested invoices. After IMS had done so, Aubuschon took these tools and invoices to the supplier of the tools, National Auto Supply. The clerk at National Auto Supply advised IMS that Aubuschon had attempted to exchange the tools for money. Aubuschon claims that he attempted to exchange the tools IMS had supplied for other tools.

On May 24, 1983, IMS's job site superintendent, Van Den Handel, held a meeting with Aubuschon and Ralph Gogolek, the Union president. At that meeting, Van Den Handel gave to Aubuschon and Gogolek copies of a notice of discipline and an attached memo ("Notice"). The Notice stated as follows:

> On Friday, May 13, 1983 the company received a call from National Auto regarding your attempt to "sell back" your company supplied tools, using the copy of an invoice supplied by the company. The company advised National Auto not to accept them. This action on your part is a blatant abuse of company supplied equipment and records and amounts to theft.
>
> Three (3) times now the company has replaced your tools, the last time under very suspicious circumstances. Your at-

> tempt to redeem your recently supplied company tools for cash is a serious offense and warrants disciplinary action. Hense [sic] you are hereby suspended for five (5) days pending discharge.

IMS issued the Notice to Aubuschon because IMS considered Aubuschon's attempt to sell the tools for money to be a breach of the Contract, a violation of the settlement of Aubuschon's previous grievance concerning IMS's refusal to replace his missing tools, and a violation of IMS's plant rules 16, 19, 24, 25 and 27. The Notice was issued to Aubuschon and Gogolek pursuant to Sections 13.1 and 13.3 of the Contract.

Aubuschon's employment was terminated on May 31, 1983. Aubuschon grieved his discharge and that grievance was ultimately submitted to arbitration pursuant to the Contract. On November 28, 1983, the arbitrator issued his decision, reinstating Aubuschon, but without back pay.

B. Trial Court Case

On March 19, 1984, Aubuschon filed a claim in the Third Judicial Circuit Court for Madison County, Illinois for malicious libel against IMS and Van Den Handel as a result of publication of the Notice. IMS and Van Den Handel raised in their answer the affirmative defenses of federal labor law preemption, absolute privilege and qualified privilege. IMS and Van Den Handel subsequently filed a Motion for Summary Judgment based, among other things, on preemption of Aubuschon's state tort claim under Section 301 of the Labor Management Relations Act ("LMRA") and Sections 7 and 8 of the National Labor Relation Act ("NLRA"). On September 24, 1986, the Circuit Court denied this motion. However, pursuant to Illinois Supreme Court Rule 308(a), Ill. Rev. Stat. Ch. 110A, ¶308, the Circuit Court also ruled that the preemption issue was subject to immediate appeal to the Appellate Court of Illinois, Fifth District. Appendix, Part C.

C. Appellate Court of Illinois, Fifth District

IMS and Van Den Handel filed a timely appeal of the order of the Circuit Court to the Appellate Court of Illinois, Fifth District. The question presented on appeal was as follows:

> The issue is whether a bargaining-unit employee's defamation action against his employer is preempted by federal law under Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, or Sections 7 and 8 of the National Labor Relations Act, 29 U.S.C. §§157, 158, where the action is based upon a notice of discipline issued by the employer stating the reason for the employee's suspension, the conduct which resulted in the discipline was alleged by the employer to violate employer work rules established pursuant to the collective bargaining agreement and to relate to the collective bargaining agreement and the settlement of a grievance, and the governing collective bargaining agreement contained provisions relating to grievance resolution and employee discipline.

The Appellate Court accepted the appeal and reversed the Circuit Court based on this Court's decisions in *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202 (1985). The Appellate Court also ruled that Aubuschon's defamation claim did not fall within the various exceptions to preemption under §§7 and 8 of the NLRA which this Court delineated in *Linn v. United Plant Guard Workers,* 383 U.S. 53 (1966) and *Farmer v. Carpenters,* 430 U.S. 290 (1977). Appendix, Part B.

D. Supreme Court of Illinois

Aubuschon appealed the Appellate Court's decision to the Supreme Court of Illinois. Aubuschon based his appeal on the claims that the Appellate Court's decision conflicted with decisions of other Illinois Courts of Appeals and was manifestly unjust. In the statement of facts portion of his Petition for Leave to Appeal to the Illinois Supreme Court, Aubuschon admitted

that the Notice was provided "pursuant to the terms and conditions of the collective bargaining agreement" and that the "truth or the falsity of the statement contained in [the Notice was] a matter of serious dispute between the parties, and required reference to the collective bargaining agreement for substantiation or denial."

On December 8, 1988, the Illinois Supreme Court allowed Aubuschon's petition for leave to appeal, reversed the decision of the Appellate Court without opinion, and remanded the case to the Circuit Court of Madison County for further proceedings. Appendix, Part A. The Illinois Supreme Court's order cited, without comment, the case of *Krasinski v. United Parcel Service,* 124 Ill. 2d 483, 530 N.E.2d 468 (1988). Appendix, Part A. The Illinois Supreme Court discussed at length in *Krasinski* the issue of preemption under §301 of the LMRA and §§7 and 8 of the NLRA.

IMS and Van Den Handel then filed with the Illinois Supreme Court a Motion for Reconsideration or, in the alternative, a Petition for Rehearing. The Supreme Court of Illinois denied this motion/petition. Appendix, Part D. Thereafter, IMS and Van Den Handel filed a motion with the Illinois Supreme Court to recall the mandate for further proceedings, based on Petitioners' intent to file this Petition for a writ of certiorari. The Illinois Supreme Court granted the motion, and recalled and stayed the mandate on February 1, 1989. Appendix, Part E.

REASONS FOR GRANTING THE WRIT

The order of the Illinois Supreme Court in this case should be reviewed on a writ of certiorari by this Court because it is in direct conflict with applicable decisions of this Court. In addition, the order of the Illinois Supreme Court raises important questions of federal labor law which are likely to recur and which should be decided by this Court. Specifically, this case illustrates and involves the practical problems state and federal courts continue to have in applying the tests this Court devised for determining when state law claims are preempted by federal labor laws. This case also illustrates and involves the detrimental impact which can occur to the federal policy of uniform enforcement of federal labor laws when, as herein, confusion regarding the preemption tests under federal labor laws leads the highest court in a State to rule that state law may regulate conduct mandated by a collective bargaining agreement.

A. The Order Of The Illinois Supreme Court Is A Final Judgment Or Decree By The Highest Court In The State Of Illinois.

Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. §1257. Accordingly, the Illinois Supreme Court's order, of which Petitioners seek this Court's review, must be a final judgment or order of the highest court in the State of Illinois.

The Illinois Supreme Court is the highest court in Illinois. Ill. Const. art. VI, §1 et seq.; Ill. Rev. Stat. Ch. 37. The ruling by that court in this matter, therefore, satisfies the second part of the above-stated standard for this Court's jurisdiction.

With respect to the finality requirement of 28 U.S.C. §1257, this Court has previously ruled that this requirement is to be given a "practical rather than a technical construction." *Local No. 438 v. Curry,* 371 U.S. 542, 549 (1963); *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546 (1949). Moreover, this Court has ruled that it shall treat the decision of a federal

issue as a final judgment for purposes of 28 U.S.C. §1257, and will take jurisdiction without awaiting the completion of additional proceedings anticipated in lower state courts, if the following criteria are met:

1. "the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on non-federal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come"; and,

2. "a refusal immediately to review the state court decision might seriously erode federal policy."

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 482-83 (1975). This case satisfies both of these criteria.

The federal issue which the Illinois Supreme Court decided was that §301 of the LMRA and §§7 and 8 of the NLRA do not preempt Aubuschon's state law defamation claim. If a trial were to be held in Illinois state court on Aubuschon's defamation claim, IMS and Van Den Handel might prevail on such non-federal grounds as the defense of privilege or the defense of truth. If that were to occur, review of the preemption issues by this Court would be unnecessary. However, if this Court were to reverse the Illinois Supreme Court's order, on the ground that Aubuschon's defamation claim is preempted by federal labor laws, IMS and Van Den Handel would be spared the time, expense and effort of defending themselves in any further state court proceedings in this matter.

In addition, this Court has long recognized the existence of a national policy of uniform federal labor law. Moreover, this

Court has recognized that state law claims can "upset the balance of power between labor and management expressed in our national labor policy," *Allis-Chalmers Corp.*, 471 U.S. at 212 n. 6, and can "create potential frustration of national purpose." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959). Accordingly, this Court has previously ruled that failure immediately to review state court decisions, such as the one herein, may seriously erode federal policy. *See Belknap, Inc. v. Hale*, 463 U.S. 491, 497 n. 5 (1983); *Curry*, 371 U.S. at 550.

Based on the foregoing, the order of the Illinois Supreme Court is a final determination of the highest court of the State of Illinois for purposes of 28 U.S.C. §1257.

B. A Writ Of Certiorari Should Be Granted Because The Order Of The Illinois Supreme Court Conflicts With The Principles Governing Preemption Under Section 301 Of The LMRA Set Forth In This Court's Prior Applicable Decisions.

Section 301 of the LMRA grants federal courts jurisdiction over suits for violations of contracts between an employer and a labor organization representing employees of an industry affecting commerce. 29 U.S.C. §185. In *Allis-Chalmers Corp. v. Lueck*, this Court stated the importance of a uniform body of federal labor law and stressed the importance of protecting the effectiveness of industrial self-government through arbitration. This Court then delineated the preemption test that it had designed to ensure that parties could not avoid the effects of federal labor laws by characterizing a claim for violation of a collective bargaining agreement (properly brought pursuant to §301 of the LMRA) as a state tort law claim.

> Our analysis must focus, then, on . . . whether evaluation of the tort claim is inextricably intertwined with considerations of the terms of the labor contract. If the state tort

law purports to define the meaning of the contract relationship, that law is preempted.

Allis-Chalmers Corp., 471 U.S. at 213. More recently, in *Lingle v. Norge Division, Magic Chef,* this Court clarified that a state law claim must be preempted by §301 of the LMRA if *either* the plaintiff's claim or the defendant's *defenses* to the state claim require reference to or interpretation of the applicable collective bargaining agreement. *Lingle,* 486 U.S. ____, ____, 100 L.Ed.2d 410, 419-20. *See Hanks v. General Motors Corp.*, 859 F.2d 67, 70 (8th Cir. 1988). It is Petitioners' position that the Illinois Supreme Court's order upholding Aubuschon's right to pursue his state defamation claim against Petitioners conflicts with the principles this Court set forth in *Allis-Chalmers Corp.* and in *Lingle* for resolving questions of preemption under §301 of the LMRA. It is also Petitioners' position that this case presents, for the first time, questions under *Lingle* regarding application of the preemption test to a defendant's defenses.

Aubuschon's defamation claim and the defenses IMS and Van Den Handel have raised to that claim are inextricably intertwined with the terms of the Contract. Article 15 of the Contract authorized IMS to discipline and discharge employees for cause and to promulgate and enforce reasonable work rules. This same Article required Aubuschon to comply with IMS's work rules. Sections 13.1 and 13.3 of the Contract required IMS to provide the Union with notice of any suspension or discharge IMS imposed. More importantly, these contractual provisions also required that any reprimand IMS issued to a bargaining-unit employee be in writing and state, among other things, the time and place of the incident which led to suspension/discharge.

Under Illinois law, to establish a defamation claim a plaintiff "must set out sufficient facts to show that the defendants made a *false* statement concerning him, that there was an *unprivileged publication* to a *third party* with fault by the defendant, which

caused damage to the plaintiff." *Krasinski v. United Parcel Service,* 124 Ill. 2d 483, ____, 530 N.E.2d 468, 471 (1988) (emphasis added). On its face, therefore, Aubuschon's defamation claim raises three issues which can be resolved only by reference to the Contract.

First, whether the statements in the Notice are false will depend on what, for example, constitutes stealing and abuse of company supplied equipment and records *as those terms are used in the work rules under the Contract.*[1] That the meaning of terms and phrases in a collective bargaining agreement need not coincide with the meaning of those same terms and phrases under state civil or criminal court proceedings is a well recognized tenet of the "system of industrial self-government" favored by federal labor law, i.e., arbitration. *See Allis-Chalmers Corp.,* 471 U.S. at 219; *Lingle,* ____ U.S. at ____, 100 L.Ed.2d at 422. This is perhaps best illustrated by the fact that the language in a collective bargaining agreement can control the allocation of the burden of proof and the standard of proof applied in an arbitration proceeding; similarly, the standard of proof applied in labor management arbitrations, even where the employee conduct at issue might justify criminal prosecution, is usually less than the burden a prosecutor in this country must satisfy in criminal proceedings. F. Elkouri and E. Elkouri, *How Arbitration Works* 614-15 and 661-63 (4th ed. 1985). In addition, interpretation of the Contract will be required to resolve such issues as whether the term "stealing", as used in the work rules, is synonymous with the term "theft", as used in the Notice. Moreover, the truth of the statements in the Notice may also be affected by the terms of the settlement of Aubuschon's 1982 grievance under the Contract over IMS's initial refusal to

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[1] The reference in the plant rules to various types of prohibited conduct, such as stealing, and abuse of company supplied equipment and records identifies "this arena as a subject for the collective bargaining process - not the courts." *Laws v. Calmat,* 852 F.2d 430, 433 (9th Cir. 1988).

replace Aubuschon's tools again. Hence, Aubuschon's ability to establish that statements in the Notice were false, will depend on the meaning of the allegedly defamatory statements under the Contract.

Second, whether the alleged publication was privileged will depend on whether IMS and Van Den Handel were required by contract (and hence by federal labor laws)[2] to issue a notice, containing the allegedly defamatory statements contained in the Notice, to the people who received the Notice. For example, interpretation of the Contract will be needed to determine whether the Union President who received the Notice was acting in the capacity of a committeeman, under §13.1 of the Contract, and/or a steward, under §13.3 of the Contract, when he received the Notice.

Third and finally, whether there was ever a publication to a third party will depend on the nature of the relationship between Aubuschon and the Union. Again, this issue depends on the terms of the Contract and how that contractual relationship has been shaped by the existing body of federal labor law.

Similarly, the defenses available to IMS and Van Den Handel require reference to and interpretation of the Contract. IMS and Van Den Handel timely raised the affirmative defenses of absolute privilege and qualified privilege to Aubuschon's claim. If a trial occurs, they may also raise the defense of truth. As stated previously, whether the statements in the Notice are true or false depends on whether and how various terms and phrases contained in the Notice are defined in, or interpreted under, the Contract.

As to the affirmative defense of qualified privilege, the Supreme Court of Illinois has defined the elements of this

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[2] §301 of the LMRA, 29 U.S.C. §185, grants federal courts jurisdiction over suits for violations of collective bargaining agreements.

defense as follows: (1) good faith by the defendant; (2) an interest or duty to be upheld; (3) a statement limited in its scope to that purpose; (4) a proper occasion; and (5) publication in a proper manner and to proper parties only. *Zeinfeld v. Hayes Freight Lines, Inc.*, 41 Ill. 2d 345, 349, 243 N.E.2d 217, 221 (1968). Obviously, the elements of this defense cannot be evaluated or resolved without referring to and interpreting whether IMS and Van Den Handel had a duty *under the Contract* to advise Aubuschon *and the Union* of the reason for Aubuschon's suspension and termination, and whether IMS and Van Den Handel properly fulfilled their contractual obligations when they published the Notice to the Union.

With respect to the final affirmative defense IMS and Van Den Handel have raised, the Illinois Supreme Court has ruled that the defendants in a defamation action have an absolute privilege, and the alleged defamation is not actionable, if the plaintiff consented to the publication. *See Chapski v. Copley Press*, 92 Ill. 2d 344, 442 N.E.2d 195, 198 (1982) (recognizing the privileges set forth in the *Restatement (Second) of Torts* §583 (1977)). Whether Aubuschon consented to any contractually required publication when he became a member of the Union is thus another pertinent issue which cannot be resolved without interpretation of the Contract.[3] Moreover, it is well recognized that an absolute privilege attaches to any publication which a party is under a legal compulsion to make. *See Chapski*, 442 N.E.2d at 198 (recognizing the privileges set forth in the *Restatement (Second) of Torts* §592A and Comment b (1977)). To determine whether such a legal compulsion existed in this case, the obligations of IMS and Van Den Handel under the

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[3] There is authority for finding such consent based on membership in a union whose collective bargaining agreement requires the employer to notify the union of discipline and/or discharges. *Joftes v. Kaufman*, 324 F.Supp. 660 (D.D.C. 1971); *Hellesen v. Knaus Truck Lines, Inc.*, 370 S.W.2d 341 (Mo. 1963); *Turner v. Gateway Transportation Co.*, 569 S.W.2d 358 (Mo. Ct. App. 1978).

Contract, *and* under federal labor laws regulating enforcement of collective bargaining agreements, must be considered and analyzed.

In sum, Aubuschon's state law claim and the defenses IMS and Van Den Handel have raised to that claim raise questions which cannot be answered without reference to and interpretation of various terms and provisions of the Contract. Accordingly, the order of the Supreme Court of Illinois in this case, allowing Aubuschon to pursue his defamation claim, conflicts with the preemption principles this Court set forth in *Allis-Chalmers* and *Lingle,* and threatens the national scheme of a uniform body of federal labor laws. This Court should issue a writ of certiorari to resolve this conflict and to protect the national scheme of uniform federal labor laws.

C. A Writ Of Certiorari Should Be Granted Because The Order Of The Illinois Supreme Court Conflicts With This Court's Prior Applicable Decisions Regarding Preemption Under Sections 7 And 8 Of The NLRA.

In *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959), this Court delineated the following test for preemption under §7 and §8 of the NLRA:

> It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Regulations Board . . . . When an activity is *arguably* subject to §7 or §8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the *danger* of state interference with National policy is to be averted.

Id. at 244-45 (emphasis added). This Court also emphasized in *Garmon* that state regulation would be preempted even as to conduct which this Court might ultmately conclude did not conflict with federal policy:

> In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction . . . . The governing consideration is that *to allow the State to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy.*

Id. at 246 (emphasis added). Under *Garmon,* therefore, *potential,* rather than actual, conflict is the key test for preemption under §7 and §8 of the NLRA.

Aubuschon's complaint is based on a disciplinary notice which IMS and Van Den Handel were required by contract, and hence federal labor law,[4] to issue to the Union. An employer's compliance with pre-termination procedures set forth in a collective bargaining agreement is subject to Section 8(a)(5) of the NLRA, 29 U.S.C. §158(a)(5). *N.L.R.B. v. Amoco Chemicals Corp.,* 529 F.2d 427 (5th Cir. 1976); *Redway Carriers, Inc.,* 274 N.L.R.B. 1359 (1985). Had IMS and Van Den Handel failed to supply the Notice to the Union, therefore, their failure would have subjected IMS to an unfair labor practice charge under §8(a)(5) of the NLRA *See N.L.R.B. v. Amoco Chemicals Corp.,* 529 F.2d at 431 (employer's unilateral change in disciplinary enforcement procedure is an unfair labor practice). Consequently, the Notice IMS and Van Den Handel issued to Aubuschon and the Union was in fact (and not just potentially) subject to §7 and §8 of the NLRA. Accordingly, the order of the Illinois Supreme Court in this matter conflicts with this Court's ruling in *Garmon.*

Furthermore, the situation presented by this case does not fall within the narrow exception to *Garmon* preemption which this Court recognized in *Linn v. United Plant Guard Workers,* 383

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[4] See footnote 2.

U.S. 53 (1966). *Linn* involved a defamation action which arose out of statements made during a union organizing campaign and not, as here, a communication *required* by a collective bargaining agreement. *Linn* is thus distinguishable because it involved a different type of labor dispute and, more importantly, because it did not involve publication of statements *mandated by a collective bargaining agreement and, hence, by federal law.*[5] *See Hull Central Transport, Inc.*, 628 F.Supp. 784, 789 (N.D. Ind. 1986). The Illinois Supreme Court's order that an action for defamation arising out of an employer's publication of a disciplinary notice to a union, as *required* by a collective bargaining agreement, survives *Garmon* preemption, places state law in conflict with the employer's federal statutory and contractual obligation to issue such a disciplinary notice. Under such circumstances, employers such as IMS may be subject to a state libel action each time they comply with their federal statutory and contractual obligation to issue a disciplinary notice to an employee's union. Clearly, this situation upsets "the balance of power between labor and management expressed in our national labor policy." *Allis-Chalmers Corp.*, 471 U.S. at 212 n.6.

In sum, the order of the Supreme Court of Illinois, allowing Aubuschon to pursue his defamation claim, runs afoul of two important principles of federal labor policy under §§7 and 8 of the NLRA. First, it enables a state court to adjudicte a controversy properly within the exclusive jurisdiction of the National Labor Relations Board. Second, it enables state regulation of conduct which is mandated by a collective bargaining agreement, and in doing so, "creates potential frustration of national purposes." *Garmon,* 359 U.S. at 244.

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[5] See footnote 2.

D. A Writ Of Certiorari Should Be Granted Because, As Illustrated By The Order Of The Illinois Supreme Court, Important Questions Of Federal Labor Law Which Should Be Decided By This Court Remain After This Court's Decision In Allis-Chalmers And Lingle.

The source of Aubuschon's defamation claim — the Contract provisions requiring IMS to provide the Union with notice of any reprimand, suspension or discharge — is not an unusual collective bargaining agreement provision.[6] Consequently, the type of preemption and federal labor policy issues raised by Aubuschon's defamation claim have occurred in the past and are likely to recur under a variety of collective bargaining agreements in a variety of states.[7] The reason questions con-

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[6] *See* footnote 3 and *Gregory v. Simon Bros. Inc.*, 640 F.Supp. 1252 (N.D. Ind. 1986). In addition, even if not specifically required by any provision of a collective bargaining agreement, an employer's past practice of instituting discipline, such as providing a union with notice of any discipline or discharge the employer imposes, can evolve into a custom which the employer may not unilaterally abandon without subjecting itself to an unfair labor practice charge and/or an arbitration proceeding. *See NLRB v. Amoco Chemicals Corp.*, 529 F.2d 427 (5th Cir. 1976); *Coca-Cola Bottling Co.*, 9 Lab. Arb. (BNA) 197 (1947) (Jacobs, Arb.); *see also* F. Elkouri and E. Elkouri, *How Arbitration Works*, 444 (4th ed. 1985).

[7] The frequency with which these issues are likely to recur is illustrated by the following cursory list of cases dealing with defamation claims brought by bargaining unit employees against their employers. *Newberry v. Pacific Racing Ass'n.*, 854 F.2d 1142 (9th Cir. 1988); *Strachan v. Union Oil Co.*, 768 F.2d 703, 704-06 (5th Cir. 1985); *Scott v. General Motors Corp.*, 645 F.Supp. 914 (E.D. Mo. 1986); *Gregory v. Simon Bros. Inc.*, 640 F.Supp. 1252 (N.D. Ind. 1986); *Seid v. Pacific Bell, Inc.*, 635 F.Supp. 906 (S.D. Cal. 1985); *Green v. Hughes Aircraft Co.*, 630 F.Supp. 423 (S.D. Cal. 1985); *Hull v. Central Transport, Inc.*, 628 F.Supp. 784 (N.D. Ind. 1986); *Reynolds Metal Company v. Mays*, 516 So.2d 517 (Ala. 1987), *vacated and remanded*, ____ U.S. ____, 100 L.Ed.2d 915 (1988); *Nelson v. Lapeyrouse Grain Corp.*, No. 87-161, slip op. (Ala. Sept. 30, 1988) (LEXIS, States library, Ala. file); *Cokley v. Pacific Gas and Electric Co.*, 119 L.R.R.M. (BNA) 3454, 3457-58 (N.D. Cal. 1984); *Krasinski v. United Parcel Service*, 124 Ill. 2d 483, 530 N.E.2d 468 (1988).

tinue to arise about the preemptive effect of federal labor laws on state libel and defamation claims is because this Court's rulings in *Allis-Chalmers Corp.* and *Lingle* do not provide sufficient guidance to federal and state courts on how to resolve these questions. Compare, for example, the decisions of state supreme courts upholding a state law defamation action in this case, in *Krasinski,* 530 N.E.2d 468, and in *Nelson v. Lapeyrouse Grain Corp.,* No. 87-161, slip op. (Ala. Sept. 30, 1988), with the federal court decisions finding preemption of state defamation claims in *Strachan,* 768 F.2d at 705-06, *Hull,* 628 F.Supp. at 789 and *Gregory,* 640 F.Supp. at 1255-56. This Court should grant a writ of certiorari herein to ensure that federal and state courts have the guidance needed to enforce federal labor policy in a uniform manner. This case is a particularly suitable case for this purpose because, unlike many of the previous defamation cases in which the issue of preemption was raised, both the allegedly defamatory statement and the alleged publication were specifically required by the applicable collective bargaining agreement.

Furthermore, if this Court fails to review the order of the Illinois Supreme Court in this matter, there could be a significant detrimental impact on labor-management relations in this country. Specifically, under the Illinois Supreme Court's order in this matter, employers who are parties to a collective bargaining agreement which requires the employer to advise the union, orally or in writing, when and why any bargaining-unit employee is disciplined or discharged, are placed in the untenable position of having to choose among the following three undesirable options each time the need for discipline, including discharge, arises:

> (1) the employer may impose no discipline even though it considers an employee's conduct to be improper, harmful or dangerous;
>
> (2) the employer may impose discipline for improper conduct, provide the contractually required notice to the

> Union, and thereby become subject to a state defamation claim for the contents of the contractually required notice; or
>
> (3) the employer may impose discipline for improper conduct, breach its contractual obligation to provide the union with notice of the discipline, and thereby become subject to an unfair labor practice charge before the National Labor Relations Board ("NLRB"), suit under §301 of the LMRA and/or an arbitration proceeding under the applicable collective bargaining agreement.[8]

The first of these options is undesirable because it enables state law to define what rights and authority an employer may have or may safely exercise in any collective bargaining situation. This first option also effectively restructures the management of business in this country. The second alternative is undesirable because: (a) it permits an employee to seek redress for the same alleged wrong in both a contractually required arbitration proceeding and in court, (b) it substantially shifts the economics and emotions in any collective bargaining situation, and (c) it is likely significantly to affect an employer's ability to locate competent employees who are willing to carry out the employer's contractual obligations because they too, like Van Den Handel, may be civilly sued for fulfilling their employer's contractual responsibilities. Finally, the third option is undesirable because it trades litigation in one forum for litigation in up to three other forums. Moreover, this last option completely erodes the possibility of effective and efficient "industrial self-government" through arbitration because a Union cannot possibly prepare to defend a disciplined or discharged

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[8] Of course the one advantage of the third option is that an absolute privilege is likely to attach to any statement the employer and its agents make before the NLRB, a court in a §301 suit, or an arbitrator. *See Restatement (Second) of Torts* §592A (1977).

employee if the union has never been advised of the reason for the discipline or discharge.[9]

In sum, there exists a great deal of confusion among federal and state courts regarding the federal labor policy towards state defamation claims in the context of a collective bargaining relationship. The Illinois Supreme Court's order adds to this confusion and also threatens the stability and goal of the existing federal labor law scheme. Accordingly, this Court should issue a writ of certiorari to review the order of the Supreme Court of Illinois in this matter.

CONCLUSION

For each of the foregoing reasons, International Mill Service and Thomas Van Den Handel respectfully request that this Court grant the writ of certiorari.

Respectfully submitted,

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Dated March 8, 1989

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[9] Similarly, because the NLRB and this Court have recognized the right of unionized employees to have a union representative present during any investigative interview which the employee reasonably believes may lead to disciplinary action (*NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975)), this right, combined with the possibility of a state tort claim of defamation, may make it impossible for employers even to investigate suspected improper employee misconduct without subjecting themselves to state defamation claims. *See Strachan v. Union Oil Co.*, 768 F.2d 703, 706 (5th Cir. 1985).

APPENDIX PART A

Illinois Supreme Court
Juleann Hornyak, Clerk
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

December 8, 1988

Mr. Ira L. Blank
Popkin and Stern
8182 Maryland Ave. 15th Floor
St. Louis, Missouri 63105

No. 67186 — James Aubuschon, petitioner, v. International Mill Service, et al., respondents. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today ALLOWED the petition for leave to appeal in the above entitled cause and entered the enclosed supervisory order.

The mandate of this Court will issue to the Appellate Court on December 30, 1988.

NO. 67186 — SUPERVISORY ORDER

In the exercise of this Court's supervisory jurisdiction, the judgment of the Appellate Court, Fifth District, No. 5-87-0216, is REVERSED and the order of the Circuit Court of Madison County, No. 84L272, denying defendants' motion for summary reversal is AFFIRMED. (Krasinski v. United Parcel Service (Oct. 20, 1988), No. 65439.) This cause is remanded to the Circuit Court of Madison County for further proceedings.

APPENDIX PART B

No. 5-87-0216

In The Appellate Court of Illinois

Fifth District

James Aubuschon,

Plaintiff-Appellee,

v.

International Mill Service and
Thomas Van Den Handel,

Defendants-Appellants.

Appeal from the Circuit Court of Madison County

Honorable George J. Moran, Jr., Judge Presiding.

Filed: April 27, 1988

MR. JUSTICE KARNS delivered the opinion of the court:

James Aubuschon, plaintiff, began working for International Mill Service (IMS) in June of 1979. He was a member of Local 2762 of the United Steelworkers of America (the Union) which, in turn, was party to a collective-bargaining agreement with IMS. Under this agreement, IMS agreed to replace its employees' personal tools used in the performance of their specific jobs which were lost or missing at the job site unless there was an abuse of the replacement provision.

During the summer of 1980, Aubuschon reported his tools as being stolen, and IMS replaced the tools in accordance with the collective-bargaining agreement. In 1981, Aubuschon again reported his tools as being stolen, and again IMS replaced the tools. From February to August of 1982, Aubuschon was off work. When he returned to work in August, his tools were not in his locker. Aubuschon requested a new set of tools, but IMS refused to replace the tools a third time. Aubuschon subsequently filed a written grievance in accordance with the

collective-bargaining agreement pertaining to the replacement of his tools. IMS ultimately agreed to replace the missing tools necessary to his job. IMS informed Aubuschon, however, that they would no longer replace his missing tools and that he would have to accept and use the specific tools supplied. Aubuschon, in turn, asked for invoices for the tools to insure them.

On May 13, 1983, after IMS furnished Aubuschon with replacement tools and the accompanying invoices, Aubuschon took the tools and invoices to the supplier, National Auto Supply. According to IMS, Aubuschon attempted to turn the tools in for money. Aubuschon claims he only wanted to exchange them for different tools. A clerk at National Auto Supply refused to accept the tools after talking to IMS.

Approximately 11 days later, Aubuschon's superintendent, also a defendant in this matter, met with Aubuschon and the union president to give them copies of a notice of discipline. The notice stated that Aubuschon was suspended five days pending discharge for attempting to sell back the tools. Aubuschon was discharged on May 31, 1983. Again, in accordance with the provisions of the collective-bargaining agreement, Aubuschon filed a written grievance protesting his discharge. The grievance was submitted to arbitration, whereupon the arbitrator issued his decision, reinstating Aubuschon without back pay. According to the collective-bargaining agreement, decisions of the arbitrator are final and binding upon IMS, the union and all employees concerned.

Upon being reinstated, Aubuschon filed this action for defamation in the circuit court of Madison County based upon the alleged publication of his disciplinary action notice. IMS and the superintendent filed a motion for summary judgment claiming preemption under federal labor law. The circuit court denied the motion from which defendants now appeal. We reverse, finding that Aubuschon's cause of action for defamation is preempted under federal labor law by section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185.

By virtue of the supremacy clause of article VI of the Federal Constitution (U.S. Const., art. VI, cl. 2), federal law, in most instances, overrides or preempts state law on the same subject matter. (*Allis-Chalmers Corp. v. Lueck* (1985), 471 U.S. 202, 208, 85 L.Ed.2d 206, 213, 105 S.Ct. 1904, 1909; *Bartley v. University Asphalt Co.* (1986), 111 Ill. 2d 318, 327, 489 N.E.2d 1367, 1371.) Section 301 of the LMRA vests jurisdiction in the federal courts for actions alleging violations of labor contract provisions or breaches of collective-bargaining agreements. (*Allis-Chalmers*, 471 U.S. at 210, 85 L.Ed.2d at 215, 105 S.Ct. at 1911; *Green v. Hughes Aircraft Co.* (S.D. Cal. 1985), 630 F.Supp. 423, 426.) Therefore, any state action, whether it be in tort or contract, alleging such violations are preempted. (*Bartley*, 111 Ill. 2d at 328, 489 N.E.2d at 1371.) But the scope of preemption under section 301 is not limited solely to violations and breaches. Any state law which attempts to define the meaning of a term in a labor contract or the relationship created by a collective-bargaining agreement necessarily is preempted also. (*Allis-Chalmers*, 471 U.S. at 210-11, 85 L.Ed.2d at 215, 105 S.Ct. at 1911.) Consequently, when resolution of a cause of action is substantially dependent upon analysis of the terms or upon the interpretation of a labor agreement, the claim is preempted. (*Lingle v. Norge Division of Magic Chef, Inc.* (7th Cir. 1987), 823 F.2d 1031, 1042, *cert. granted* (1987), ____ U.S. ____, 98 L.Ed. 2d 185, 108 S.Ct. 226; *Bartley*, 111 Ill. 2d at 330-32, 489 N.E.2d at 1372-73.) The issue before us then is whether Aubuschon's claim is sufficiently independent of the collective-bargaining agreement to withstand the preemptive force of section 301.

Aubuschon argues the notice of discipline suspending him pending discharge was defamatory and therefore within the purview of state tort law. What Aubuschon fails to recognize is that this notice and its publication to his union specifically were contemplated by a collective-bargaining agreement and grievance procedure. The statements were directly related to his suspension and discharge and specifically invoked articles of the

collective-bargaining agreement. (See *Suffel v. Manville Building Materials* (N.D. Ohio February 24, 1986), No. C85-7650, slip op. at 11.) They not only intertwined with IMS' right to discipline for proper cause and with the contractual requirement that statements of discipline be furnished to and in the presence of the union, but also with the contractual requirement that employees abide by IMS plant rules and with labor and management's right to resolve disputes openly in accordance with the collective-bargaining agreement. (See *Green*, 630 F.Supp. at 427.) Moreover, the statements also intertwined with the agreement between IMS and the union settling Aubuschon's grievance concerning replacement of missing tools. As such, Aubuschon's claim necessarily arises out of the collective-bargaining agreement and therefore is preempted. See *Scott v. Machinists Automotive Trades District Lodge No. 190* (9th Cir. 1987), 827 F.2d 589, 594; *Stallcop v. Kaiser Foundation Hospitals* (9th Cir. 1987), 820 F.2d 1044, 1049, *cert. denied* (1987), ____ U.S. ____, 98 L.Ed.2d 502, 108 S.Ct. 251; *Strachan v. Union Oil Co.* (5th Cir. 1985), 768 F.2d 703, 706; *Peffley v. Durakool, Inc.* (N.D. Ind. 1987), 669 F.Supp. 1453, 1462. See also *Hasten v. Phillips Petroleum Co.* (10th Cir. 1981), 640 F.2d 274, 276-78 (discharge later required by agreement privileged). *Cf. Tellez v. Pacific Gas & Electric Co.* (9th Cir. 1987), 817 F.2d 536, 538, *cert. denied* (1987), ____ U.S. ____, 98 L.Ed.2d 209, 108 S.Ct. 504.

Regardless of how Aubuschon characterizes his cause of action, resolution is dependent upon analysis of the collective-bargaining agreement between IMS and the union, as well as upon the agreement settling his grievance regarding missing tools. If Aubuschon were allowed to proceed with state tort claims for defamation in this instance, grievance arbitration procedures would be rendered meaningless and the entire federal framework of collective-bargaining would be undermined. (See *Allis-Chalmers*, 471 U.S. at 219, 85 L.Ed.2d at 220, 105 S.Ct. at 1915; *Lingle*, 823 F.2d at 1046-47; *Green*, 630 F.Supp. at 427; *Perkins v. Pepsi-Cola General Bottlers, Inc.* (2d

Dist. 1987), 158 Ill.App.3d 893, 899, 511 N.E.2d 901, 905.) To hold that Aubuschon's claims are sufficiently independent of the collective-bargaining agreement would elevate form over substance and allow him to evade the requirements of federal labor law. *Allis-Chalmers*, 471 U.S. at 211, 85 L.Ed.2d at 215, 105 S.Ct. at 191.

Aubuschon points out three cases, *Gonzalez v. Prestress Engineering Corp.* (1986), 115 Ill.2d 1, 503 N.E.2d 308, *cert. denied* (1987), 483 U.S. ____, 97 L.Ed.2d 779, 107 S.Ct. 3248; *Krasinski v. United Parcel Service, Inc.* (3d Dist. 1987), 155 Ill.App.3d 831, 508 N.E.2d 1105 (petition for leave to appeal granted); and *Fisher v. Illinois Office Supply Co.* (3d Dist. 1984), 130 Ill.App.3d 996, 474 N.E.2d 1263, which arguably support his position. These cases, however, are distinguisable.

Gonzalez v. Prestress Engineering Corp. focuses on two employees who alleged that they were discharged in retaliation for filing workers' compensation claims. Because the resolution of their claims did not depend upon an interpretation of a labor agreement and because the graveman of their claims arose out of an alleged violation of clearly mandated public policy, their claims were not preempted by section 301. (115 Ill.2d at 9-12, 503 N.E.2d at 311-13.) Here, however, resolution of Aubuschon's claim is substantially dependent upon interpretation of the terms of a collective-bargaining agreement and his cause of action does not involve a discharge in violation of clearly mandated public policy. The reasoning of *Gonzalez* therefore is inapplicable to the instant situation.

The third district in both *Fisher* and *Krasinski*, on the other hand, has determined that malicious defamation claims are not preempted by federal labor law. Both cases, however, involved instances of actual malice outside the scope of the collective-bargaining agreements. Neither case involved claims in which resolution was substantially dependent upon analysis of the terms of the respective labor agreements, and, as a result, also

are inapposite to the cause of action before us. We choose not to follow the reasoning in either *Fisher* or *Krasinski*, finding the reasoning of cases such as *Green* to be more in line with the Supreme Court's decision in *Allis-Chalmers* and with the general policies behind preemption in connection with collective-bargaining agreements.

Because of our finding Aubuschon's defamation claim to be preempted under section 301 of the LMRA, we need not address the issue of preemption under sections 7 and 8 of the National Labor Relations Act, 29 U.S.C. §§ 157, 158. Suffice it to say, we do not believe Aubuschon's cause of action falls within the narrow exceptions to preemption found in *Linn v. United Plant Guard Workers* (1966), 383 U.S. 53, 15 L.Ed.2d 582, 86 S.Ct. 657 or in *Farmer v. United Brotherhood of Carpenters & Joiners* (1977), 430 U.S. 290, 51 L.Ed.2d 338, 97 S.Ct. 1056. See *Green*, 630 F.Supp. at 427 n.1.

For the aforementioned reasons, we find that Aubuschon's cause of action against IMS and his superintendent is preempted by federal labor law. The trial court therefore lacked jurisdiction over the subject matter of this action (see *Sagen v. Jewel Companies* (2d Dist. 1986), 148 Ill.App.3d 447, 450, 499 N.E.2d 662, 664), and should have granted the motion for summary judgment. We therefore reverse the order of the circuit court of Madison County and remand this cause for entry of summary judgment in favor of defendants.

REVERSED AND REMANDED WITH DIRECTIONS.

HARRISON, P.J. AND WELCH, J., concur.

APPENDIX PART C

In The Circuit Court
Third Judicial Circuit
Madison County, Illinois

James Aubuschon,
Plaintiff,

v.

International Mill Service, et al.,
Defendants.

No. 84-L-272

ORDER

Filed: March 10, 1987

Willard V. Portell
Clerk of Circuit Court
Third Judicial Circuit
Madison County, Illinois

Defendants' motion for summary judgment as amended and/or to issue an order pursuant to Ill.Sup.Ct. Rule 308, ch. 110A, ¶308, Ill.Rev.Stat., was heard and submitted on February 27, 1987.

The Court hereby orders as follows:

1. Defendants' motion for summary judgment as amended is denied.

2. Pursuant to Ill.Sup.Ct. Rule 308(a), ch. 110A, ¶308, Ill.Rev.Stat., the Court finds that this order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. The question of law is as follows: Whether a bargaining-unit employees's defamation action against his employer is preemp-

ted by federal labor law under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, or Sections 7 and 8 of the National Labor Relations Act, 29 U.S.C. §§157, 158, where the action is based upon a notice of discipline issued by the employer stating the reason for the employee's suspension, the conduct which resulted in the discipline was alleged by the employer to violate employer work rules established pursuant to the collective-bargaining agreement and to relate to the collective-bargaining agreement and the settlement of a grievance, and the governing collective bargaining agreement contained provisions relating to grievance resolution and employee discipline.

3. Pursuant to Ill.Sup.Ct. Rule 308(e), ch. 110A, ¶308, Ill.Rev.Stat., any application for permission/leave to appeal or the granting thereof shall stay all proceedings in this court.

SO ORDERED:

Date: 3-10-87

/s/ George J. Moran, Circuit Judge

Copies to counsel of record:

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APPENDIX PART D

State of Illinois

Supreme Court Clerk

Supreme Court Building

Springfield 62706

January 11, 1989

Mr. Ira L. Blank
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St. Louis, MO 63105

Mr. Robert W. Wilson
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THE COURT HAS TODAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

No. 67186 — James Aubuschon, petitioner, v. International Mill Service, et al., respondents.

Motion by respondents for reconsideration of this Court's supervisory order entered December 8, 1988. Motion *denied*. The mandate of this Court issued today.

JH: as

cc: Mr. John Hopkins

APPENDIX PART E

In The Supreme Court of Illinois

No. 67186

Appeal from Appellate Court
Fifth District
AC5-87-0216

James Aubuschon,
Petitioner,

v.

International Mill Service, et al.,
Respondents.

ORDER

Filed: February 1, 1989

This matter has come for consideration upon the motion of respondents to recall and stay the mandate of this Court pending appeal or application for *certiorari* in the United States Supreme Court.

IT IS ORDERED that the mandate of this Court in the above cause is recalled and stayed pending the filing of a notice of appeal or an application for *certiorari* or the expiration of the period within which said application or notice may be filed. If *certiorari* is applied for or notice of appeal filed, the mandate of this Court shall, upon proof of such filing being made by affidavit filed with the clerk of this Court, be further stayed pending resolution by the United States Supreme Court of such application or appeal. If no such affidavit is filed, the mandate shall, without further order, issue upon the expiration of the time within which appeal or *certiorari* may be sought.

/s/ Horace L. Calvo, Justice

APPENDIX PART F

§ 185. Suits by and against labor organizations

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

§ 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be pro-

hibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on

any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or any other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an ob-

ject thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c) (1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up,

deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159 and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the

collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided,* That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,* That for the pur-

poses of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided,* That nothing in this subsection shall set aside the final proviso to subsection (a) (3)

of this section: *Provided further,* That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

(g) A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d) of this section. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

Supreme Court, U.S.
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No. 88-1479

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

INTERNATIONAL MILL SERVICE,

and

THOMAS VAN DEN HANDEL,

Petitioners,

vs.

JAMES AUBUSCHON,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

REASONS WHY WRIT SHOULD BE DENIED

I. With the facts herein presented, the law is well settled to deny Petitioner the defense of Federal preemption.

The Illinois Supreme Court, in an Order published at 530 N.E.2d 976 (1989), denied the Petitioners' attempt to use the preemption doctrine to block the Respondent's day in Court. (Petitioners' Appendix A-1). In reversing the Fifth District Appellate Court's decision, the Illinois Supreme Court specifically found its prior decision in *Krasinski v. United Parcel Service*,

124 Ill.2d 483, 530 N.E.2d 468 (1988) to be the controlling principle of law. The Illinois Supreme Court, in deciding *Krasinski*, looked both to this Court's decision in *Lingle v. Norge Division of Magic Chef*, 486 U.S. ____, 100 L.Ed.2d 410 (1988), as well as a subsequent decision applying *Lingle*, that being *Mays v. Reynolds Company*, ____ U.S. ____, 108 S.Ct. 2814, 100 L.Ed. 915 (1988).

In *Mays*, as in the case at bar, the Plaintiff filed a State Court action for defamation arising out of the publication of a Notice of Discharge. The Defendant employer claimed a defense of preemption and in a decision found at 516 So.2d 517, (Ala. 1987), the Alabama Supreme Court upheld the preemption defense and barred the aggrieved employee from the Courthouse door. The employee then filed his Petition for Writ of Certiorari.

In a memorandum decision, the Petition for Writ of Certiorari was granted, the Alabama Supreme Court's decision summarily vacated, and the case sent back for further considerations in light of the *Lingle* decision with expectations that the decision would be reversed outright with, at the very least, the matter being sent back for a jury trial on the merits.

Unquestionably, the trilogy of decisions, *Lingle, Mays,* and *Krasinski* stand in opposition to the blanket application of the preemption doctrine so proposed by the Petitioner. As set forth in some detail in all three cases, the essence of the claim — the breach of the Defendant's duty towards the Plaintiff — finds its root in State common law, and not in the Union Contract. As such, as in *Lingle, Krasinski, Mays*, and now *Aubuschon*, the preemption doctrine is and was wholly inapplicable. The factual similarities between *Mays* and *Aubuschon* are obvious and apparent. The applicability of the preemption defense in a libel case based on malicious falsehoods in the Notice of Discipline has been clearly decided in the negative. Petitioners present no new factual situations, only a repeat of facts and questions of

law previously decided. This is a settled area of law, where, despite the Petitioners' attempts to draw distinctions without differences, no true conflict exists. As the supreme national forum, this Honorable Court takes great pains to be judicious in the selection of its docket. It would surely be a waste of the Court's precious time, and in the process infringe upon the rights of the parties legitimately before the Court, to perpetuate debate on such a predetermined point of law, a debate which serves no purpose save to fill the pockets of corporate lawyers inveighing against the inevitable. Such a pointless waste cannot and must not be allowed.

Since *Lingle, Mays,* and *Krasinski* are clearly controlling, there exists no just reason for the Court to grant a Writ of Certiorari. Therefore, the Petitioners' Writ of Certiorari should be denied.

II. The immunity from suit sought by Petitioners should be rejected by this Honorable Court.

The Petitioners seek a grant of total immunity to employers from defamation suits by employees if any part of the statement, its required publication, or evidentiary proof of its truth or falsity are in any way dependant upon the terms and conditions of a collective bargaining agreement. Immunity from suit breeds contempt for the rights of workers; immunity from suit breeds contempt for the collective bargaining process; immunity from suit breeds contempt for the rule of law, and a distrust of the entire legal system. The collective bargaining agreement machinery simply cannot cope with actions for defamation, and to immunize the Petitioners in this context would promote a carelessness that would know no bounds. The harms alleged by the Respondent in his suit for malicious defamation are capable of remedy only outside the scope of a collective bargaining agreement; preemption by Federal labor law is clearly inappropriate. The Respondent's suit is for malicious defamation, a basic and fundamental right to be protected by appropriate

judicial process, not abandoned to the imprecise and capricious confines of arbitration. The Petitioners have myopically focused on the collective bargaining agreement itself, and the mandatory requirement of publication of grievance notices and responses. What has been conveniently overlooked is the content of the grievance memorandum, and the false and defamatory statement contained therein. Aubuschon's case is not a case for replevin of missing tools; it is not an action for breach of contract to supply replacement tools; it is and remains an action for malicious libel brought about by defamatory statements contained in a memorandum attached to a notice of grievance proceedings. The mere fact that publication was required by the collective bargaining agreement is of and in itself irrelevant, as publication is but one element of Respondent's case. The fact that publication was mandated and not discretionary does not and cannot permit the employer total immunity from defamation of character. If the matters contained in any memorandum are legitimately part of the grievance process and made in good faith and not with malice, then privileges would attach that would deny Respondent's claim. The Respondent complains not only because of the publication of the memorandum, but because of the false and malicious material contained therein. The Respondent's claim is for defamation brought about by the malicious and reckless conduct of the Petitioners. The dangers of the requirement of publication in the collective bargaining agreement are neutralized by the conditional privilege for common business interests. However, as this Court is well aware, this privilege is *lost* upon a showing of malice or an absence of good faith. *Zeinfeld v. Hayes Freight Lines, Inc.*, 41 Ill. 2d 345, 243 N.E.2d 217 (Ill. 1968). If *Aubuschon* is reversed, in addition to the substantial protection granted by the conditional privileges, the Petitioners would now be totally immunized from suit, only to be restrained by their own elements of conscience. As past history sorely teaches, corporate self-restraint is but an illusory form of protection; it would be woefully inadequate.

All citizens have a basic and fundamental right to be free from defamatory statements, maliciously made and intentionally published. James Aubuschon nor any other union member should be held to have abandoned this right as terms and conditions of a collective bargaining agreement. The substantial and long-standing rights of all citizens to be free from malicious defamation cannot and must not be sacrificed at the altar of efficient industrial relations. This Court is most respectfully urged to deny the Petition for Writ of Certiorari and let stand the decision of the Supreme Court of Illinois.

CONCLUSION

For the reasons set forth herein, the Respondent, James Aubuschon, respectfully requests that said Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

The Respondent, at page 3 of his opposing brief No. 88-1479, has argued that the harms alleged in the Respondent's suit for malicious defamation "are capable of remedy only outside the scope of a collective bargaining agreement" and, therefore, that preemption of the Respondent's defamation claim, based on federal labor laws, "is clearly inappropriate." Respondent has cited no authority for this argument or the allegation that the Respondent's alleged injuries can only be adequately remedied "outside the scope of a collective bargaining agreement." Nonetheless, even if one were to assume for the sake of argument that the only avenue by which Respondent can obtain ade-

quate relief for his alleged injuries is a state law defamation claim, it does not follow that preemption of such a claim, based on federal labor laws, is inappropriate.

Respondent's argument places the proverbial horse before the cart. When a potential state law cause of action is preempted by federal labor laws, it means that no court has proper subject matter jurisdiction over the state law action. This Court has previously ruled that the "nature of the relief available *after* jurisdiction attaches is, of course, different from the question whether there is jurisdiction to adjudicate the controversy." *Avco Corp. v. Aero Lodge, I.A.M. & A.M.*, 390 U.S. 557, 561 (1968) (emphasis added). The threshold question, therefore, must be whether the court has jurisdiction over the claim and *not* whether the claim affords the preferred remedy or even any adequate remedy. A plaintiff's preference for a particular remedy, in other words, cannot create subject matter jurisdiction where it does not otherwise exist.

Thus, in *Avco Corp.*, this Court ruled that a claim based on §301 of the Labor Management Relations Act was properly removed to federal court even though the injunctive relief the plaintiff had sought could *only* be obtained in a *state* court proceeding. In so ruling, this Court specifically stated:

> the breadth or narrowness of the relief which may be granted under federal law and § 301 cases is a distinct question from whether the court has jurisdiction over the parties and the subject matter.

Avco Corp., 390 U.S. 557, 561 (1968); *see Caterpillar v. Williams*, 482 U.S. ____, 96 L.Ed. 2d 318, 326 n.4 (1987); *Franchise Tax Bd. v. Laborers Vac. Trust*, 463 U.S. 1, 23 (1983).

In light of this Court's prior rulings in *Avco Corp.*, *Franchise Tax Bd.* and *Caterpillar*, the Respondent's apparent preference for a remedy allegedly not available under federal labor laws is not a valid reason for denying Petitioners' Petition for a Writ of

Certiorari. The questions raised in this case remain important questions of federal labor law which should be resolved by this Court. Accordingly, Petitioners respectfully request that this Court grant the writ of certiorari.

Respectfully submitted,

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Dated: May 31, 1989